PUBLIC PROSECUTOR

V.

BACHO BIN SAMSUDIN

HIGH COURT TAWAU
TUAN IAN H.C. CHIN JC.
[CRIMINAL TRIAL NO. T. 1 OF 1990]
24 JULY 1993

CRIMINAL LAW: Trafficking - Circumstantial evidence to prove custody or control - Whether presumptions in s. 37(g) & (d) Dangerous Drugs Act 1952 made out - Whether accused had exclusive possession of room in which drugs recovered -ss. 39B(1)(a), 39B(2) Dangerous Drugs Act 1952.

The accused was charged with trafficking in cannabis in his room in a house in Tawau. He was stopped at a junction near his residence by police and taken back to his room and the room searched. 5 envelopes containing cannabis were found in various parts of the room. The accused denied knowledge of them. He shared the house with several family members who at various times had access to his room. Occasionally, in particular the night before the incident, the accused had friends visiting in the room.

The Prosecution sought to rely on the presumptions as laid down in ss37(g) and (d) of the DDA 1952. There was no direct evidence to show that the accused had knowledge of the cannabis in the room. The mother of the accused testified that the accused was told to wait outside the room while the search was being conducted but the police witnesses denied this.

Held:

[1] An "occupier" within s37(g) of the DDA means to have exclusive occupation. The cumulative evidence in this case goes to show that the accused did not have exclusive use of the room.

All the family members had excess and the room though sometimes locked by the accused was accesible through the use of the room key which was hung by the door or near the window of the room. It cannot be irresistibly inferred that the room was locked and the key with the accused all the time. The prosecution have failed to establish the facts necessary to invoke s37(g).

[2] The accused was not caught with the manual or physical possession of the drugs. Therefore the prosecution urges that the fact the accused was caught with the key to the room where the cannabis was justifies the conclusion that he had custody and control of the drugs. This assumption cannot be made as the accused had a room which was accesible to several people. There were also no fingerprints of the accused on the envelopes containing the drugs. The accused did not resist arrest. The facts as adduced by the prosecution are insufficient to infer the accused had custody or control of the envelopes containing the cannabis.

The prosecution has failed to establish a *prima facie* case.

[Accused discharged and acquitted].

Cases referred to:
*Low Geok Yeok v. PP [1982] 2MLJ 346 (**refd**)*
*Lim Say Hun v PP [1950] MLJ 116 (**refd**)*
*PP v Lai Ah Bee [1974] 2 MLJ 74 (**refd**)*
*Lee Chee Meng v PP [1992] 1 MLJ 322 (**refd**)*
*PP v. Lin Lian Chen [1992] 1 AMR 46:253 (**refd**)*

Legislation referred to:
Dangerous Drugs Act, 1952, ss.37(d) & 37(g), ss 39B(1)(a), 39B(2)

JUDGMENT

Ian H.C. Chin JC:

Bacho bin Samsudin ("the accused") is charged with trafficking in 538.01 grammes of cannabis in his room in a house numbered X499 in Kg.Titingan, Tawau, at 4.00 p.m. on 19 October 1989 in contravention of the provisions of s.39B(1)(a) and punishable under s.39B(2) of the Dangerous Drugs Act 1952. The evidence of the prosecution can be summarised as follows.

Constable Hamzah bin Bukit ("PW5") testified that he on 19 October 1989 told Inspector Hamzah bin Ahmad ("PW4") that the accused, whom he knew, would be selling cannabis in his house in Kg. Titingan (also known as Kg. Icebox), Tawau. PW4 organised a police party comprising, including himself, 5 police officers. At 3.40 p.m. the police party arrived by car at a junction leading to the house of the accused at which moment the accused was driving a vehicle heading for a main road away from the direction of his house. PW4 blocked the passage of the accused's car. The accused was thereafter taken from his car to his house. The mother

of the accused ("PW8") opened the door to let the police party in. The accused led the police party to his room ("the room") where the door to the room was opened by the accused with a key which the accused took from his pocket. A search of the room was then made in the presence of the accused which resulted in the recovery of 5 envelopes containing cannabis and which envelopes were recovered from different places in the room, viz., one from among clothing inside a wardrobe, three from the cabinet of a bed headrest and one from under a pillow on top of a mattress; and all of which PW4 took custody. It is to be noted that PW8 in her evidence said that the police party went inside and searched the room without the accused and that the accused was at that time outside the house, guarded by a policeman and only brought to the room after some time. Khalid Safan ("PW1"), a government chemist, had testified that the matter found in the five envelopes which he examined and analysed was cannabis within the meaning of s.2 of the Dangerous Drugs Act, 1952, and that the cannabis plant showed no sign of extraction. Other witnesses testified to the proper custody of the exhibits which show an unbroken chain in the evidence. Evidence was given by the accused's father ("PW9"), mother ("PW8"), sister ("PW10") and two brothers ("PW11" and "PW12") that though the room was for the use of the accused, the said family members had access when the room was not locked or when the key to the room was left hanging either by the door or by a spot near the window of the room and which was accessible from outside the window. PW10 gave evidence that on the morning of 19 October 1989, just before she went to work at 7.30 a.m., she ironed the clothing of the accused and put them in the wardrobe of the room. She also tidied the room while the accused was taking his bath. The night before, she heard voices of the friends of the accused coming from the room. She also testified that there was a glass-top table in the room on that morning on which there was a torn envelope and that she did not see any envelope in the wardrobe.

To sum up, the evidence appears to establish the fact that, at the moment the police party wanted to enter the room of the accused, (1) the room was locked, (2) the key to the room was with the accused, (3) the door to the room was only unlocked after the key of the accused was used, (4) the room was for the occupation of the accused, and (5) the cannabis were concealed in 5 envelopes hidden in various part of the room. The other material evidence of the prosecution can be summarised as follow:-

(1) the friends of the accused were in the room the night before the accused arrest;
(2) PW10 was in the room in the morning of the 19 October 1989 until about 7.30 a.m. when the accused was taking his bath;
(3) the accused was on 19 October 1989 arrested in a car on a road at about 3.40 p.m. and was later taken to the room;
(4) the key to the room of the door was sometime hung outside the door or by the window of the door to enable access to the room while the accused was away from the house; and
(5) the room was at times not locked.

The question to be answered in deciding whether there is a case for the accused to answer is this: are the facts of this case sufficient to invoke the presumptions of possession and knowledge, respectively, under s.37(d) and s.37(g) of the Dangerous Drugs Act, 1952? The prosecution had to rely on these two presumptions because the accused was not caught with physical or manual possession of the cannabis and there is no direct evidence that the accused knew the cannabis were hidden in the room. In relation to s.37(d), the court has to determine whether from the facts of this case it could be inferred that the accused had custody or control of the cannabis. I will first deal with s.37(g) which reads -

> If any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;

To be an "occupier" within the meaning of s.37(g), it has been decided, the person must have "exclusive occupation" (see *Low Geok Yeok v. PP* [1982] 2 MLJ 346; *Lim Say Hun v. PP* [1950] MLJ 116 and *PP v. Lai Ah Bee*

[1974] 2 MLJ 74) or "exclusive use" (see *Lee Chee Meng v. PP* [1992] 1 MLJ 322). The facts of *Lee Chee Meng case* will illustrate what is meant by exclusive use, or rather, what did not amount to exclusive use. In that case the accused and his girlfriend were found by the police inside a room which the accused had rented. A vanity case and two shoe boxes containing drugs were found inside the room. The girlfriend visited the accused occasionally and slept in the room the night before their arrest. The friends of the accused also frequently used the room. The room was rented at the same time as another person rented another room. The door knob with the key to the room was spoilt. The Supreme Court, in that case, held that the cumulative effect of the evidence showed that the accused did not have exclusive use of the room. What then of the facts of this case? I am of the opinion that the cumulative effect of evidence in this case also shows that the accused did not have the exclusive use of the room. In the first place, all the family members of the accused could have and had access to the room. The room was at times not locked and even on those occasions when the room was locked the key was left hanging by the door or near the window of the room to enable anyone who wished to have access to the room to get the key therefrom. The friends of the accused were in the room the night before the arrest of the accused and the sister ("PW10") was in his room in the morning on the day in question. No evidence was led as to when the accused left the room on the day in question though there was evidence to say he was taking his bath when PW10 was ironing his clothing. There was no evidence to say the key to the room was with the accused from the time PW10 left the room at about 7.30 a.m. to the time the accused was arrested at about 3.40 p.m. The evidence shows that before 7.30 a.m. on 19 October 1989, the accused did not have the exclusive use of the room. The prosecution must establish that on 19 October 1989 between 7.30 a.m. and 3.40 p.m., the accused had the exclusive use of the premises. For this, the persecution must at least establish that the accused had the key to the room with him and that the door to the room was locked during the said period (7.30 a.m. to 3.40 p.m. on 19 October 1989) which would exclude the possibility of anyone gaining access to his room if the key was at that time with the accused and thus establish the exclusiveness of the use of the room by the accused for that particular period, bearing in mind that there was, according to PW10, no drug in the wardrobe when PW10 was in the room that morning. There is no such evidence. In fact, there is complete silence with regard to this period. When PW8 (the mother of the accused) gave evidence as to the events on 19 October 1989, she was not asked at all regarding the events relating to the said period. She was only asked about the arrival of the police party in the afternoon. She was there the whole day and, in fact, she was in the house the whole week leading to that day. She definitely could throw some light on when the accused left the house, on whether and when the accused took the key to the room with him and on whether the door to the room was locked. She was not asked at all. Could it be inferred then, that, since the key was with the accused when he was arrested at about 3.40 p.m. that day, the accused must have had the key with him and the door to the room was locked all the while from about 7.30 a.m. (when his sister PW10 left the room) to about 3.40 p.m. (when he was arrested) which would go to establish that the accused for that period had exclusive use of the room and it being possible that the cannabis only appeared in the room after about 7.30 a.m. (since PW10 said she did not see any when she was in the room)? It is obvious that the inference cannot be made. It could very well be that the accused may have left the house in the morning of that day without locking his room or, though having locked the door, leaving the key to his room hanging by the door or the window and thus well be that the accused, after being away the whole morning and afternoon without locking his room, had just returned to the room to collect his key and was about to drive away in his car when he was arrested. Since the possibilities exist, it cannot be irresistibly inferred that the room was locked and the key was with the accused all the time between 7.30 a.m. that day until the accused was arrested with the key. These possibilities create gaping holes in the evidence as to render it unjustifiable to infer that, because the accused was arrested with the key on him at about 3.40 p.m., the accused must have had the key all the time from 7.30 a.m. that day. That being the case,

the accused at the relevant time did not have the exclusive use of the room. The prosecution have failed to establish the facts necessary to invoke s.37(g) and therefore cannot impute to the accused that he knew the cannabis were hidden in is room.

It was also urged by the learned deputy that the fact that the accused was caught with the key to the room where the cannabis were hidden together with other evidence, which I will refer to later on, justify the conclusion that the accused had custody or control of the cannabis and thus activate the presumption of possession and knowledge under s37(d). It will be recalled the accused was not caught with manual or physical possession of the cannabis. Therefore the prosecution had to rely on circumstantial evidence to prove that the accused had custody or control and this evidence, as urged by the learned deputy, are (1) the finding of the key to he room on the body of the accused and (2) the testimony of PW9, PW10, PW11 and PW12 that they did not put the cannabis in the room. But, as I have said earlier, the accused did not have the exclusive use of the room, other people had access to the room and the cannabis could very well be in the room because of these other people. There was no evidence to how long the room remained locked just after PW10 had left the room at 7.30 a.m. that morning and before the accused was arrested at 3.40 p.m. There was also no evidence that the accused is finger prints were found on the envelopes. The accused did not give any difficulty to the police when he was arrested. There was also the contradiction between the testimony of PW4 and that of PW8 regarding whether the accused was present when the room was searched- PW4 and other policemen testified the accused was, whereas PW8 said the accused knew the cannabis were in the room. Given those circumstances, the facts adduced by the prosecution are not sufficient to infer that the accused had custody or control of the envelopes containing the cannabis. The presumption of s.37(d) cannot, therefore, be invoked. See *PP v. Lin Lian Chen* [1992] 1 AMR 46:2253. The prosecution had therefore failed to establish a prima facie case.

I therefore discharge and acquit the accused. The cannabis are to be destroyed by burning in the compound of the High Court in Tawau and to be witnessed by the Senior Assistant Registrar. The destruction is to be carried out only after the disposal of any appeal against the decision herein or, if there be no appeal, after the time limited for appeal. The identity card (Exhibit P12) and the three photographs (Exhibits P11(b), P11(c) and P11(d)) are to be returned to the accused after the said period.